Muhammad Farid bin Muntalib v Tan Sri Dato' Sri Khalid bin Abu Bakar, Pengerusi Lembaga Tatatertib Polis Diraja Malaysia Bukit Aman & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-143–04 OF 2016
ROHANA YUSUF, BADARIAH SAHAMID AND ABDUL RAHMAN SEBLI JJCA
1 NOVEMBER 2018

Administrative Law — Judicial review — Dismissal of public servant — Disciplinary action against civil servant — Show cause letter sent to civil servant including charge — Judicial review application dismissed by trial judge — Whether report of Investigative Body damaging or prejudicial to appellant — Whether appellant should been afforded opportunity to refute or counteract findings in report — Whether failure to give appellant access to report and opportunity to respond procedural impropriety which offended principles of natural justice

Constitutional Law — Public servants — Dismissal — Disciplinary action against public servant — Right to be heard — Whether public servant had been denied reasonable opportunity to defend himself — Whether order of dismissal bad in law — Federal Constitution art 135(2)

The appellant was at the material time an Inspector of Police in the Royal Malaysian Police Force. On 19 March 2012, the appellant was issued a show cause letter by the first respondent with a view of dismissal or reduction in rank under reg 37 of the Public Officers (Conduct and Discipline) Regulations 1993 (Amendment) 2002 in which two charges were preferred against the appellant for the offence of soliciting for a bribe and failure to lodge a police report in respect of a stolen car. He was given 21 days to submit a written representation. The appellant submitted his written representation to the Disciplinary Authority vide his letter dated 4 April 2012 in response to the show cause letter. By a letter dated 11 January 2013, the appellant was informed that the Disciplinary Authority had found the appellant guilty of both charges preferred against him and decided to impose the penalty of dismissal from the rank of a Police Inspector for the first charge. With respect to the second charge, a fine of seven days salary was imposed on him. Dissatisfied with the decision, the appellant on 8 April 2013 filed for judicial review to quash the decision. The application was heard and dismissed by the learned judge on 15 March 2016. Hence, this appeal. The issues for consideration were: (a) whether the report of the Investigative Body was

damaging or prejudicial to the appellant; (b) whether the appellant should had been afforded the opportunity to refute or counteract the findings in the report; and (c) whether a failure to give the appellant access to the report and the opportunity to respond to the said report was a procedural impropriety which offended the principles of natural justice.

Held, by majority, dismissing the appeal:

(1) **(per Abdul Rahman Sebli JCA, majority)** The procedure adopted by the Disciplinary Authority was in accordance with the principle laid down by the Judicial Committee of the Privy Council in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169. There was therefore no basis for the appellant to allege that there was a serious flaw in the procedure adopted by the Disciplinary Authority, thereby occasioning a grave miscarriage of justice (see paras 46 & 49).

(2) **(per Abdul Rahman Sebli JCA, majority)** The argument that the report and/or recommendation of the Investigative Body, being an 'interested party', constituted fresh, additional and adverse material which was damaging and prejudicial to the appellant was to be of no substance. In the first place, the Investigative Body did not recommend that the appellant be found guilty of the charges and be punished for the offences. It merely gave its opinion that the appellant failed to exculpate himself from the charges, but left the final decision to the Disciplinary Authority to determine the appellant's guilt or otherwise. It was far fetched for learned counsel to suggest that the Disciplinary Authority, which was headed by the Deputy Inspector General of Police, could be influenced by the investigating officer, a policeman with the rank of Assistant Superintendent of Police, in determining the guilt or otherwise of the appellant. The Disciplinary Authority had been provided with all the information it needed to enable it to evaluate the evidence and to make a well-informed decision (see paras 52–53 & 55).

(3) **(per Badariah Sahamid JCA, dissenting)** The learned judge had seriously misdirected herself. A perusal of the report disclosed in no uncertain terms that the contents of the report was damaging and thus highly prejudicial to the appellant (see paras 11 & 13).

(4) **(per Badariah Sahamid JCA, dissenting)** It was not pertinent that that there was no evidence that the appellant had requested for the report. Since the appellant was entitled to be given a copy of the report, that right cannot be forfeited by his failure to request for it (see para 25).

(5) **(per Badariah Sahamid JCA, dissenting)** There was a serious procedural impropriety in the decision-making process of the Disciplinary Authority. The appellant had been denied a reasonable opportunity to defend himself which was a violation of the appellant's

constitutional right to be heard as enshrined in art 135(2) of the Federal Constitution. The order of dismissal by the Disciplinary Authority was bad in law for procedural impropriety. Accordingly the dismissal of the appellant from the Malaysian Police Force was void inoperative and of no effect (see para 26).

[Bahasa Malaysia summary

Perayu pada masa material adalah seorang Inspektor Polis di Pasukan Polis Diraja Malaysia. Pada 19 Mac 2012, perayu telah diberikan surat tunjuk sebab oleh responden pertama dengan tujuan pemecatan atau pengurangan pangkat di bawah peraturan 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan) 2002 di mana dua pertuduhan telah dikenakan terhadap perayu atas kesalahan mendapatkan rasuah dan kegagalan untuk membuat laporan polis berkenaan dengan kereta yang dicuri. Beliau diberikan 21 hari untuk menyerahkan representasi bertulis. Perayu mengemukakan representasi bertulisnya kepada Pihak Berkuasa Tatatertib melalui suratnya bertarikh 4 April 2012 sebagai jawapan kepada surat tunjuk sebab. Melalui surat bertarikh 11 Januari 2013, perayu dimaklumkan bahawa Pihak Berkuasa Tatatertib telah mendapati perayu bersalah atas kedua-dua pertuduhan yang dikenakan terhadapnya dan memutuskan untuk mengenakan hukuman pemecatan dari pangkat Inspektor Polis untuk pertuduhan pertama. Berkenaan dengan pertuduhan kedua, denda tujuh hari gaji telah dikenakan kepadanya. Tidak puas hati dengan keputusan itu, perayu pada 8 April 2013 memfailkan semakan kehakiman untuk membatalkan keputusan itu. Permohonan itu telah didengar dan ditolak oleh hakim yang bijaksana pada 15 Mac 2016. Oleh itu, rayuan ini. Isu-isu untuk pertimbangan adalah: (a) sama ada laporan Badan Penyiasatan merosakkan atau memudaratkan perayu; (b) sama ada perayu sepatutnya diberi peluang untuk membantah atau menyangkal penemuan dalam laporan itu; dan (c) sama ada kegagalan untuk memberi perayu akses kepada laporan dan peluang untuk membalas laporan tersebut adalah suatu ketidakpatuhan prosedur yang menyinggung prinsip keadilan semulajadi.

Diputuskan, dengan majoriti, menolak rayuan:

(1) **(oleh Abdul Rahman Sebli HMR, majoriti)** Prosedur yang diterima pakai oleh Pihak Berkuasa Tatatertib adalah selaras dengan prinsip yang ditetapkan oleh Jawatankuasa Kehakiman Majlis Privi di *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169. Oleh itu, tidak ada asas bagi perayu untuk mendakwa bahawa terdapat kecacatan serius dalam prosedur yang diterima pakai oleh Pihak Berkuasa Tatatertib, dengan itu menyebabkan kegagalan keadilan yang serius (lihat perenggan 46 & 49).

(2) **(oleh Abdul Rahman Sebli HMR, majoriti)** Hujahan bahawa laporan dan/atau saranan Badan Penyiasatan, sebagai 'pihak yang

A berkepentingan', menjadikan material baru, tambahan dan merugikan yang merosakkan dan memudaratkan kepada perayu adalah tidak berasas. Pertamanya, Badan Penyiasatan tidak menyarankan bahawa perayu didapati bersalah atas tuduhan itu dan dihukum atas kesalahan itu. Ia hanya memberi pendapat bahawa perayu gagal melepaskan dirinya B daripada tuduhan, tetapi meninggalkan keputusan akhir kepada Pihak Berkuasa Tatatertib untuk menentukan perayu bersalah atau sebaliknya. Ia adalah hampir mustahil untuk peguam yang bijaksana untuk mengusulkan bahawa Pihak Berkuasa Tatatertib, yang diketuai oleh Timbalan Ketua Polis Negara, boleh dipengaruhi oleh pegawai penyiasat, C seorang anggota polis yang berpangkat Penolong Penguasa Polis, dalam menentukan perayu bersalah atau sebaliknya. Pihak Berkuasa Tatatertib telah disediakan dengan semua maklumat yang diperlukan untuk membolehkannya menilai bukti dan membuat keputusan yang baik (lihat perenggan 52–53 & 55). D

(3) **(oleh Badariah Sahamid HMR, menentang)** Hakim yang bijaksana telah tersalah arah dengan serius. Pembacaan laporan yang didedahkan tanpa ketidakpastian bahawa kandungan laporan merosakkan dan dengan demikian sangat memudaratkan kepada perayu (lihat E perenggan 11 & 13).

(4) **(oleh Badariah Sahamid HMR, menentang)** Adalah tidak penting bahawa tiada keterangan bahawa perayu telah meminta laporan itu. Oleh kerana perayu berhak diberikan salinan laporan itu, hak itu tidak boleh F dilucutkan oleh kegagalannya untuk memohonnya (lihat perenggan 25).

(5) **(oleh Badariah Sahamid HMR, menentang)** Terdapat satu ketidakpatuhan prosedur dalam proses membuat keputusan oleh Pihak Berkuasa Tatatertib. Perayu telah ditolak peluang yang munasabah untuk G mempertahankan dirinya yang merupakan pelanggaran hak perlembagaan perayu untuk didengar sebagaimana termaktub dalam perkara 135(2) Perlembagaan Persekutuan. Perintah pemecatan oleh Pihak Berkuasa Tatatertib adalah tidak sah di bawah undang-undang untuk ketidakpatuhan prosedur. Oleh itu pemecatan perayu dari H Pasukan Polis Malaysia adalah tidak sah dan tiada kesan (lihat perenggan 26).]

Notes

I For cases on dismissal, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3287–3314.

For cases on dismissal of public servant, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 443–444.

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169, PC (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114; [1994] 2 CLJ 333, SC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) & Anor [2015] 6 MLJ 77; [2015] 9 CLJ 179, CA (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi A/l K Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364, SC (refd)

Union of India And Ors v Mohd Ramzan Khan 1991 AIR 471, SC (refd)

Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2011] 5 MLJ 465; [2012] 1 CLJ 448, FC (refd)

Legislation referred to

Federal Constitution arts 132, 135(2)

Public Officers (Conduct and Discipline) Regulations 1993 reg 37, 37(1), (2), (2)(a), (2)(b), (4)

Appeal from: Judicial Review Application No 25–73–04 of 2013 (High Court, Kuala Lumpur)

G Subramanian Nair (Ebrina Zubir with him) (Maniam Nair & Co) for the appellants.

Mazlifah bt Ayob (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Badariah Sahamid JCA (delivering dissenting judgment):

[1] I have perused the majority judgment of my learned brother and sister judges in the appeal before us. After careful consideration of the majority's 'grounds of judgment' as well the records of appeal, I respectfully disagree with the decision of the majority to affirm the decision of the learned High Court judge and dismiss the appeal. In my view, there are merits in this appeal that warrant appellate intervention. My reasons are stated below.

A **[2]** Before I delve into the issues, a brief summary of the chronology of facts is pertinent. The appellant was at the material time an Inspector of Police in the Royal Malaysian Police Force. On 19 March 2012, the appellant was issued a show cause letter by the first respondent with a view of dismissal or reduction in rank under reg 37 of the Public Officers (Conduct and Discipline) B Regulations 1993 (Amendment) 2002 in which two charges were preferred against the appellant for the offence of soliciting for a bribe and failure to lodge a police report in respect of a stolen car. He was given 21 days to submit a written representation.

C **[3]** The appellant submitted his written representation to the Disciplinary Authority vide his letter dated 4 April 2012 in response to the show cause letter.

[4] By a letter dated 11 January 2013, the appellant was informed that the D Disciplinary Authority had found the appellant guilty of both charges preferred against him and decided to impose the penalty of dismissal from the rank of a Police Inspector for the first charge. With respect to the second charge, a fine of seven days salary was imposed on him.

E **[5]** At the hearing of the appeal before us, learned counsel for the appellant informed us that the focus of this appeal is in respect of issues relating to the Investigative Body. These issues are stated as follows:

(a) whether the report of the Investigative Body constituted additional, F adverse material which was prejudicial to the appellant?

(b) whether the appellant should be given access to the report before the decision of the Disciplinary Authority? and

(c) whether a failure to give the appellant access to the report and the G opportunity to respond to the said report is a procedural impropriety which offends the principles of natural justice?

[6] The first respondent who presided as the Chairman of the Disciplinary Authority had in his affidavit in reply dated 1 August 2013 acknowledged that H he had received and examined the report. He had stated in para 7 as follows:

> 7. Seterusnya saya telah menerima dan meneliti Laporan Siasatan Tatatertib ('Investigative Report') yang disediakan oleh Responden ke3. Sesalinan Laporan Siasatan Tatatertib dilampirkan dan ditanda sebagai Eksibit 'KAB-2'

I **[7]** At the judicial review application before the High Court, one of the grounds to challenge the decision-making process of the Disciplinary Authority was that the respondent had considered the report which was damaging and prejudicial to the appellant without proper notice given to the

appellant and without affording the appellant any opportunity to rebut or contradict the contents of the report.

[8] The learned High Court judge had made the finding, inter alia, that little weight should be given to the report; that the role of the Investigative Body was insignificant in that it was 'merely tasked to present the report'. Her ladyship also made the observation that the report was also not binding on the Disciplinary Authority.

[9] In addition, the learned High Court judge was of the view that there was no evidence that the Disciplinary Authority had relied on the report in arriving at its decision to dismiss the appellant. In paras 35–36 the learned judge had stated as follows (the 'applicant' here refers to the appellant in this appeal):

> 34. The Applicant also contended that the Investigative Body had evaluated the written representation and had prepared a prejudicial and damaging report which contains the review of the two charges against the Applicant. The Applicant contended that the Investigative Body had made review that the Applicant had made confession in his statement and further had failed to exculpate himself from the charges proffered against him.
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> 35. The Court is of the view that the role of the Investigative Body is very minimal and purely mechanical, in that, it was merely tasked to present the report and/or information prepared by it to the DA (Disciplinary Authority).The report prepared by the Investigative Body would not bind the DA. The Investigative Body is not the authority who decided on the contents of the report. The DA is the one who decided on the alleged misconduct of the Applicant. There is no evidence that the Respondent's decision was based on the report prepared by the Investigative Body, The DA is provided with all the information it needed to enable it to make a well-informed decision. The DA is at liberty to evaluate all the information provided, to determine the accuracy of that information and accordingly to make decision.

[10] The primary issue raised by the appellant was firstly, whether the contents of the report was damaging or prejudicial to the appellant and secondly, whether the appellant should have been afforded the opportunity to refute or counteract the findings in the report. With all due respect the learned High Court judge had failed to address the abovementioned specific and pertinent issues but instead addressed her mind to irrelevant issues. She made the finding that the role of the Investigative Body was 'minimal and mechanical', that the report was not binding on the Disciplinary Authority, that there was no evidence to demonstrate that the decision of the Disciplinary Authority was premised on the report and that the Disciplinary Authority is entitled to be provided with all information to make a well informed decision.

[11] Nowhere in her 'grounds of judgment', did Her Ladyship consider the

crucial and pertinent issues of whether the contents of the report was prejudicial to the appellant and whether the appellant should have been given a copy of the report and the opportunity to refute the allegations therein, and the related issue of whether such failure is a breach of the right to be heard. From the above findings, I am of the considered view that the learned judge had seriously misdirected herself.

[12] It is pertinent to examine the report. The report (exh KAB2) bears the title, 'LAPORAN PENUH SIASATAN TATATERTIB TERHADAP PEGANGGOTA DARI SKUAD KHAS 42 UNIT PENGUATKUASA TRAFIK JALAN BANDAR, KUALA LUMPUR'. In the report, the appellant was one of eight persons ('subject B1–B8'), who were subjected to investigation for which the Report was prepared. The report investigated the incident which forms the basis of the two charges against the appellant. In the report the appellant was referred to interchangeably as C/Insp Mohd Farid or 'subjek B1'.

[13] A perusal of the report discloses in no uncertain terms that the contents of the report was damaging and thus highly prejudicial to the appellant. The report contains particulars of the incident as well as the evidence of specifically named police officers who were investigated for the offences the appellant was charged with. Relevant extracts of the report bears this out:

> 4.2.1 Hasil siasatan kepada isu ini mendapati ada kebuktian yang jelas dimana setelah pengadu digari dan ditinggalkan dalam kereta, subjek (B1) telah membuat perbualan dan berbincang tentang bayaran jika pengadu hendak selesaikan kes itu. Untuk itu pengadu telah di minta supaya bayar RM5,000.00, oleh kerana pengadu tiada wang sebanyak itu dan setelah berbincang tawar menawar, akhirnya dipersetujui supaya dibayar sebanyak RM4,000.00 sahaja. Selepas itu (B1) tinggalkan pengadu yang sedang bergari dalam kereta dan kemudiannya dating (B8) mengawal dan menjaga pengadu dalam kereta ...
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> 4.2.2 Percakapan daripada subjek (B8) Konst 151636 Mohd Firdaus yang mengakui diarahkan oleh C/Insp mohd Farid supaya masuk dalam kereta pengadu dan selesaikan kes itu. Dia juga telah diberitahu oleh pengadu bahawa (B1) ada meminta wang sebanyak RM5,000.00 jika nak selesaikan kes itu. Dia hanya cakap abang cari dulu. Lepas itu pada jam 0430 setelah sekatan jalanraya diberhentikan, subjek (B8) telah diarahkan oleh C/Insp mohd Farid supaya bawa balik pengadu bersama keretanya ke balai. Tetapi bila sampai dibalai dia tidak pandu kereta itu masuk kebalai sebaliknya berhenti dibengkel kenderaan IPK Kuala Lumpur bagi menunggu rakan pengadu sampai. Pada jam 0500hrs 27.05.09 rakan pengadu sampai dan duduk ditempat duduk belakang. Rakan pengadu hanya bawa RM4,000.00 sahaja. Setelah (B8) maklumkan kepada (B1) dan (B1) cakap OK barulah wang itu

diserahkan dalam envelope putih kepada (B8). Setelah wang tersebut diterima, (B8) terus keluar dari kereta dan pergi kebalai Trafik. Semasa hendak keluar (B8) sempat cakap kes selesai disini sahaja. (B8) mengakui wang yang berisi dalam envelope itu telah diserahkan kepada (B1) dan diterima oleh (B1). Pagi itu sebelum (B8) balik dia telah terima sejumlah RM500.00 dari (B1) — rujuk di kdg (B8).

[14] A long line of authorities have established the legal position that particularly where damaging or prejudicial materials or information are made available to an adjudicating body, the accused is entitled to be given access to such materials and to be afforded an opportunity to refute or respond to such materials or information. This principle has been applied in the Indian Supreme Court case of *Union of India And Ors v Mohd Ramzan Khan* 1991 AIR 471 (SC) and the Malaysian Supreme Court case of *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 (SC); and significantly, in the celebrated case of *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169 at p 173 (PC) where Lord Denning had stated in succinct terms:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in Board of *Education v Rice* [1911] AC 179 down to the decision of Their Lordship's Board in *Ceylon University v Fernando* [1960] 1 WLR 223. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representation did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.

[15] The facts of *Surinder Singh Kanda* bears a striking similarity to the facts of the instant case. The appellant Surinder Singh Kanda was an Inspector in the Royal Federation of Malaya Police Force. He was dismissed by the Commissioner of Police on the charge, inter alia, that he had been guilty of an offence against discipline in that he had submitted investigation papers to his superior officers knowing the same to be false. Prior to his dismissal the Commissioner of Police had ordered an inquiry to be held. A report was prepared by the Board of Inquiry ('the report'). After considering the report, the Commissioner decided to institute disciplinary proceedings against Kanda. On 7 July 1958 he was dismissed by the Commissioner of Police on the ground that he had been guilty of an offence against discipline. Inspector Kanda brought an action in the High Court challenging his dismissal.

[16] In an action against the Government of Malaya for a declaration that his dismissal was void, one of the grounds raised was that he was not given a reasonable opportunity of being heard, contrary to art 135(2) of the Federal Constitution which provides that no member of a public service as stated in art 132, which includes the police force, 'shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard'.

[17] On appeal, one of the questions raised before the Privy Council was whether the proceedings which resulted in his dismissal were conducted in accordance with natural justice. The report of the Board of Inquiry ('the report') was sent to the adjudicating officer before he sat to enquire into the charge. The adjudicating officer had full knowledge of its contents. Insp Kanda was only given a copy of the report of the on the fourth day of the hearing of the action. The report dealt in detail with the evidence of witnesses and contained what was considered, 'a severe condemnation of Insp Kanda'. The question was whether the failure to give Insp Kanda a copy of the report and the opportunity to correct or contradict it amounted to depriving Insp Kanda a reasonable opportunity of being heard. Lord Denning had stated as follows:

> Applying these principles Their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J in these words: 'In my view, the furnishing of a copy of the findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal. The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The regulations show that it is necessary for him to have them. He will then read this out in the presence of the accused. But Their Lordships do not think it was correct to let him have the Report of the Board of Inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

[18] The issues raised in *Surinder Singh Kanda* is directly on point with the instant appeal. The Disciplinary Authority as asserted by the learned High Court judge was entitled to receive and consider the report in their deliberations prior to their decision as the report contained relevant information. However, what they were not entitled to do was to deprive the appellant of the opportunity to be given the report and the opportunity to refute or contradict the allegations in the report. As was succinctly cautioned by Lord Denning in *Surinder Singh Kanda* that, 'the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other'.

[19] The Disciplinary Authority in the instant appeal had acted in a similar way as the Board of Inquiry in *Surinder Singh Kanda* did ie in failing to provide the appellant with a copy of the report of the Investigation Body, which report had been provided to the Disciplinary Authority.

[20] In *Surinder Singh Kanda*, although Inspector Kanda was only given a copy of the report on the fourth day of the hearing, the Privy Council nevertheless found that there was a breach of natural justice in that he was not given a reasonable opportunity to be heard. The facts in this case is much worse as the appellant was never given a copy of the report and the decision to dismiss him was made without the appellant being given an opportunity to refute or contradict the report.

[21] The views of the majority on this matter was stated in paras 24–29 of the 'grounds of judgment'. An extract of the relevant paragraphs are stated below:

> [24] We have earlier referred to the appellant's contention that the Disciplinary Authority's mind had been clouded by the 'finding 'of the Investigative Body, being an 'interested party', constituted fresh, additional and adverse material which was damaging and prejudicial to the appellant. It was submitted that this additional material should not have been taken into account by the Disciplinary Authority in the decision making process.
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> [25] With due respect, we found no substance to the argument. In the first place, the Investigative Body did not recommend that the appellant be found guilty of the charges and be punished of the offences. It merely gave its opinion that the appellant failed to exculpate himself from the charges, but left the final decision to the Disciplinary Authority to determine the appellant's guilt or otherwise ...
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> [26] With due respect, we find it far-fetched for learned counsel to suggest that the Disciplinary Authority, which was headed by the Deputy Inspector General of Police, could be influenced by the Investigating Officer, a policeman with the rank of Assistant Superintendent of Police, in determining the guilt or otherwise of the appellant, and we say this without demeaning the officer's role in the disciplinary process.
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> [27] In any event there is no evidence that the Disciplinary Authority's decision was based on the Investigative Body's finding that the appellant failed to exculpate himself from the charges. As can be seen from paras 4 and 5 of the minutes of the Disciplinary Authority's meeting, the Disciplinary Authority came to its finding after considering the evidence and the appellant's representation.
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> [28] On the facts, we entirely agree with the learned judge that the Disciplinary Authority had been provided with all the information it needed to enable it to evaluate the evidence and to make a well informed decision. What is undeniable is that the Investigative Body's 'finding' (if at all it can be called a finding that the appellant failed to exculpate himself from the charges had no binding effect on the Disciplinary Authority.

A [29] It was the Disciplinary Authority and not the Investigative Body that was vested with the power to determine the guilt or otherwise of the appellant. It was therefore futile for the appellant to argue that the decision of the Disciplinary Authority had been compromised and tainted with biasness and procedural impropriety merely because the Investigative Body had given its opinion that the B appellant failed to exculpate himself from the two disciplinary charges.

[22] The reasons given in the foregoing extracts of the judgment of the majority to justify depriving the appellant of a right to a copy of the report may be summarised as follows: the report contained only an opinion that the C Investigation Body had found that the appellant had failed to exculpate himself from the charges. The report did not recommend the appellant be found guilty by the Disciplinary Authority. There was no evidence that the Disciplinary Authority was influenced by the report or had based the decision to dismiss the appellant based on the contents of the report. The report is not binding on the D Disciplinary Authority. It is the Disciplinary Authority and not the Investigative Body which makes the final decision to dismiss the appellant.

[23] With all due respect to the majority, the issue is whether the report was E damaging to the appellant and whether the appellant was entitled to be given a copy of the report which had been given to the Disciplinary Authority. This was factually the same issue before the Privy Council in *Surinder Singh Kanda* which in no uncertain terms established the right. I respectfully disagree with the view of the majority that the appellant was not prejudiced by the failure to F be provided with a copy of the report as the charges against him was clear. Whether or not the charges against the appellant is clear is a separate issue and has no bearing on whether he should have been provided with a copy of the report and given an opportunity to refute or contradict the contents of the report.

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[24] In my view, it is also not pertinent to consider whether or not the Disciplinary Authority can be or had been 'influenced' by the report or had premised their decision to dismiss the appellant based on the contents of the report. As was stated by Lord Denning in *Surinder Singh Kanda*, '… The court H will not enquire whether the evidence or representation did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough'. In the instant appeal, it is not disputed that the report was damaging to the appellant and thus there was a risk of prejudice to the appellant.

I

[25] With all due respect to the majority, in addition I do not consider it pertinent that that there was no evidence that the appellant had requested for the report. Since the appellant is entitled to be given a copy of the report, that right cannot be forfeited by his failure to request for it. It is the obligation of the

Disciplinary Authority to provide him with the report. It is not the appellant's obligation to request that he be provided with it. In any event, it is also quite likely that the appellant was unaware that the Disciplinary Authority had been provided with the report.

[26] For all the reasons abovementioned, I am of the considered view that there was a serious procedural impropriety in the decision-making process of the Disciplinary Authority. It was not disputed that the Disciplinary Authority had received and considered the report, which was damaging and highly prejudicial to the appellant. It was also not disputed that the appellant was never furnished with the report. Thus, the appellant had been denied a reasonable opportunity to defend himself which is a violation of the appellant's constitutional right to be heard as enshrined in art 135(2) of the Federal Constitution. In consequence thereof, I am of the view that the order of dismissal by the Disciplinary Authority is bad in law for procedural impropriety. Accordingly the dismissal of the appellant from the Malaysian Police Force was void inoperative and of no effect.

[27] I therefore respectfully disagree with the decision of the majority which affirmed the decision of the learned High Court judge and allow the appellant's appeal.

Abdul Rahman Sebli JCA (delivering majority judgment):

[28] Having considered the submissions by both sides, both oral and written, we dismissed the appellant's appeal by a majority decision, with our learned sister Badariah Sahamid JCA, dissenting. These are our grounds for dismissing the appeal.

[29] The facts are not in dispute and they are as follows. The appellant was at all material times an Inspector of Police with the Royal Malaysian Police. On 19 March 2012, he was issued with a show-cause letter dated 27 February 2012 by the first respondent (the Deputy Inspector General of Police cum Chairman of the Disciplinary Authority) with a view to dismissal or reduction in rank under reg 37 of the Police Officers (Conduct and Discipline) Regulations 1993 (Amendment) 2002 ('the Regulations').

[30] Two charges were preferred against the appellant and he was given 21 days to submit a written representation. The two charges against the appellant were as follows:

First Charge

Bahawa anda Inspektor Polis I/14770 Muhammad Farid Bin Muntalib sebagai pegawai awam di dalam Pasukan Polis Diraja Malaysia, ketika itu bertugas sebagai

Pegawai Penyiasat Trafik, Ibu Pejabat Kontinjen Kuala Lumpur telah didapati membelakangkan tugas awam anda demi kepentingan peribadi kerana pada tarikh 27 Mei 2009 di antara jam 0230 hingga 0500 ketika bertugas mengetuai Skuad Khas 42, Unit Penguatkuasa Trafik Jalan Bandar, Kuala Lumpur menjalankan sekatan jalanraya di Lebuhraya MRR2 berdekatan susur keluar Jalan Sg Besi, Kuala Lumpur anda telah meminta wang suapan sebanyak RM5,000 daripada En. Mohd Nursaifullah Bin Hasim, (KP: 780307-02-6249) bagi tujuan selesaikan kes tangkapan terhadapnya kerana dikatakan memandu dan memiliki kenderaan curi iaitu sebuah kereta Mercedes Benz no pendaftaran WHM 8123, dan selepas perbincangan anda bersetuju menerima wang suapan sebanyak RM4,000 sebagai ganjaran untuk membebaskannya yang diberikan melalui anggota anda iaitu Konst RF/151636 Mohd Firdaus Bin Md Ali Hairuddin. Perbuatan anda itu boleh diertikan sebagai membelakangkan tugas awam anda demi kepentingan peribadi iaitu melanggar tatakelakuan di bawah Peraturan 4(2)(a) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 seperti berikut:

4(2) Seseorang pegawai tidak boleh —

(a) membelakangkan tugas awamnya demi kepentingan peribadinya

Jika anda didapati bersalah atas pertiduhan di atas, anda boleh dihukum mengikut Peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

Second Charge

Bahawa anda Inspektor Polis I/14770 Muhammad Farid Bin Mutalib sebagai pegawai awam di dalam Pasukan Polis Diraja Malaysia, ketika itu bertugas sebagai Pegawai Penyiasat Trafik, Ibu Pejabat Polis Kontinjen Kuala Lumpur telah didapati tidak bertanggungjawab kerana pada tarikh 27 Mei 2009 di antara jam 0230 hingga 0500 ketika anda mengetuai Skuad Khas 42, Unit Penguatkuasa Trafik Jalan Bandar, Kuala Lumpur menjalankan sekatan jalanraya di Lebuhraya MRR2 berdekatan susur keluar Jalan Sg Besi, Kuala Lumpur anda telah gagal untuk membuat laporan polis ke atas tangkapan En. Mohd Nursaifullah Bin Hasim, (KP: 780307-02-6249) kerana dikatakan memandu dan memiliki kenderaan curi iaitu sebuah kereta Mercedes Benz no pendaftaran WHM 8123, dimana perbuatan ini bertentangan dengan kehendak para 5 PTKPN Bhg D204 yang menghendaki setiap pegawai polis selepas membuat tangkapan hendaklah dengan seberapa segera membuat laporan polis ke atas tangkapan tersebut. Perbuatan anda itu boleh diertikan sebagai tidak bertanggungjawab iaitu melanggar tatakelakuan di bawah Peraturan 4(2)(g) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 seperti berikut —

4(2) Seseorang pegawai tidak boleh —

(g) tidak bertanggungjawab

Jika anda di dapati bersalah atas pertuduhan di atas, anda boleh di hukum mengikut Peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

[31] The appellant submitted his written representation to the Disciplinary

Authority vide letter dated 4 April 2012 in response to the show-cause letter, in which he:

(a) categorically denied both charges;

(b) contended that the disciplinary charges were baseless;

(c) stated, inter alia, that he had checked with the police internal database which confirmed that there was no report that the Mercedes Benz WHM 8123 was stolen and that therefore he could not have committed the offence of soliciting the bribe when the vehicle was not reported stolen in the first place;

(d) complained, challenged and requested for proof and documents in this case but received no reply from the first and second respondents; and

(e) complained that the third respondent had changed the statement given by him in the investigation process to a statement which amounted to an admission of guilt and had forced him to sign the statement.

[32] Vide letter dated 11 January 2013, the appellant was notified by the first respondent that he had been found guilty of both charges and that the Disciplinary Authority had decided to impose the punishment of dismissal for the first charge with effect from 9 January 2013 and the punishment of a fine of seven days' salary for the second charge.

[33] Dissatisfied with the decision, the appellant on 8 April 2013 filed for judicial review to quash the decision. The application was heard and dismissed by the learned judge on 15 March 2016.

[34] The appellant's appeal before us was premised on a number of issues but at the commencement of the hearing, learned counsel indicated to us that he would be focusing on two main issues relating to the Investigative Body. Two questions were posed by learned counsel, and they were the following:

(a) whether the Investigative Body should have access to the representation letter of the appellant which was addressed to the Chairman of the Disciplinary Authority; and

(b) if the Investigative Body had prepared the report to the Chairman of the Disciplinary Authority, should the appellant be given access to the report?

[35] The nub of the appellant's complaint was that the Investigative Body had in fact found the appellant guilty of the charges by making a finding that the appellant failed to exculpate himself from the two charges, and this was done behind the appellant's back. It was alleged that the Investigative Body came to this finding after reading the letter of representation which the

A appellant submitted to the Chairman of the Disciplinary Authority.

[36] It was argued that by making such finding, based as it was on the appellant's letter of representation, the Investigative Body had gone beyond merely presenting its report to the Disciplinary Authority, exceeded its powers B of investigation and had encroached into the powers of the Chairman of the Disciplinary Authority.

[37] According to learned counsel, it was not the Investigative Body's duty to C determine the guilt or otherwise of the appellant and that by doing so it had clouded the Disciplinary Authority's mind in its deliberation.

[38] It was further submitted that the Disciplinary Authority should have given the appellant the opportunity to challenge the Investigative Body's D finding that he failed to exculpate himself from the charges. It was argued that the failure by the Disciplinary Authority to supply a copy of the Investigative Body's report to the appellant was an unfair procedure offending not only art 135(2) of the Federal Constitution but the principles of natural justice.

E **[39]** For a clearer understanding of the point raised by the appellant, perhaps we should reproduce verbatim what learned counsel submitted in the following paragraphs of his written submissions:

> *(c) Kertas Pertimbangan Lembaga Tatatertib Untuk Membuat Keputusan Bersalah* F *atau Tidak Bersalah serta Mengenakan Hukuman Mengikut Peraturan 38 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 Atau Tidak Bersalah (page 193 to 207 RR Jilid 2).*
>
> (c)(i) Paragraph 1 of this Report clearly shows that the Investigative Body had an G access to the representation letter of the Appellant. Upon having the access to the representation letter, they have perused through the representation letter and had given their 'ULASAN' by defending the investigation and made a finding of guilt, by stating that the Appellant was unable to exculpate himself from the charges ...
>
> (c)(ii) Thus, we strongly submit that this is a serious flaw in the decision making H process as the principle of separation powers between the Investigative Body (executive) and the Disciplinary Authority which is the decision making body has been compromised and tainted with biasness and procedural impropriety. The learned trial Judge failed totally to address her mind to this serious error.

I **[40]** The 'ULASAN' referred to by learned counsel in the above submissions is the finding of the Investigative Body in para 9 of its report, which reads:

> Setelah dikaji representasi (B1) dan (B8) serta fakta-fakta yang ada, mendapati (B1) tidak dapat membebaskan dirinya daripada kedua-dua pertuduhan yang dipertuduhkan terhadapnya.

[41] (B1) referred to in the above para 9 is the appellant. In support of his argument, learned counsel cited the Indian Supreme Court case of *Union of India And Ors v Mohd Ramzan Khan* 1991 AIR 471 where the court said at p 471:

> The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected.

[42] On the strength of this persuasive authority, it was submitted that natural justice requires that an employee (the appellant in this case) should have been given a fair opportunity to meet, explain and controvert the case made out against him before he was condemned. It was an obvious reference to the failure by the Disciplinary Authority to extend a copy of the Investigative Body's report to the appellant.

[43] As to how the learned judge dealt with the issue raised by the appellant, we reproduce below para 36 of her grounds of judgment:

> 36. The court is of the view that the role of the Investigative Body is very minimal and purely mechanical, in that, it was merely tasked to present the report and/or information prepared by it to the DA. The report prepared by the Investigative Body would not bind the DA. The Investigative Body is not the authority who decided on the contents of the report. The DA is the one which decided on the alleged misconduct of the Applicant. There is no evidence that the Respondent's decision was based on the report prepared by the Investigative Body. The DA is provided with all the information it needed to enable it to make a well-informed decision. The liberty to evaluate all the information provided, to determine the accuracy of that information and accordingly to make a decision.

[44] We do not think it is necessary for us to delve into the law on the dismissal of public officers save to say that the learned judge had directed her mind to the correct principles and had applied the principles correctly to the facts of the case. She had referred to the following authorities, amongst others: *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) & Anor* [2015] 6 MLJ 77; [2015] 9 CLJ 179; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629; *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577; *Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2011] 5 MLJ 465; [2012] 1 CLJ 448; *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169.

[45] On the evidence before her, we do not see how the learned judge could be said to have erred in finding that there was no breach of natural justice by the Disciplinary Authority in finding the appellant guilty of the two charges. Her decision is amply supported by the evidence. In the show-cause letter, all the necessary facts and particulars of the breaches of discipline alleged to have been committed by the appellant had been stated in plain and clear language for the appellant to rebut, contradict or controvert.

[46] The fact is, the show-cause letter had sufficiently and lucidly made known to the appellant the case against him, the evidence and the statements made against him, and most importantly, he had been given the opportunity to correct or contradict them. The procedure adopted by the Disciplinary Authority was in accord with the principle laid down by the Judicial Committee of the Privy Council in *Surinder Singh Kanda*. We refer in particular to the following observations made by the Judicial Committee:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179 down to the decision of Their Lordship's Board in *Ceylon University v Fernando* [1960] 1 WLR 223. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.

[47] It is pertinent to note that at no time did the appellant ever complain to the Chairman of the Disciplinary Authority that the charges were unclear. In fact, from the answers he provided in his letter of representation, it is clear that the appellant had fully comprehended the disciplinary charges leveled against him. It was a straightforward charge of soliciting and accepting a bribe for the first charge and a straightforward charge of failing to report the arrest of the Mercedes Benz driver for the second charge.

[48] The chronology of events, which we set out below, dispels any doubt that the appellant had been given a fair opportunity of being heard:

(a) the Disciplinary Authority, upon receiving the complaint of disciplinary offence committed by the appellant, determined that the nature of the offences warranted the punishment of dismissal or reduction in rank: reg 37 of the Regulations;

(b) the Chairman, upon consideration of the available information, was satisfied that there existed a prima facie case against the appellant: reg 37(1) and (2) of the Regulations;

(c) the Chairman issued the show-cause letter dated 27 February 2012 which contained two disciplinary charges with the facts of the alleged offences and the grounds on which the Disciplinary Authority proposed to dismiss the appellant or reduction in rank: reg 37(2)(a) of the Regulations;

(d) the Chairman invited the appellant to submit his written representation within 21 days to state his grounds which he relied on to exculpate himself: reg 37(2)(b) of the Regulations;

(e) the appellant submitted his letter of representation dated 4 April 2012;

(f) the Disciplinary Authority convened on 9 January 2013, and having considered the appellant's written representation, was satisfied that the appellant's representation failed to exculpate him from the disciplinary charges: reg 37(4) of the Regulations; and

(g) having considered the nature and the facts of the case, the Disciplinary Authority decided to impose the punishment of dismissal for the first charge and a fine of seven days' salary for the second charge.

[49] It is abundantly clear that the disciplinary process was carried out in strict adherence to the relevant provisions of the Regulations. There was therefore no basis for the appellant to allege that there was a serious flaw in the procedure adopted by the Disciplinary Authority, thereby occasioning a grave miscarriage of justice.

[50] It is settled that the General Order (Conduct and Discipline) (Chapter D) 1980, which has now been replaced by the Regulations, is in accord with the concept of natural justice and procedural fairness as enshrined in art 135(2) of the Federal Constitution: see *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333 (SC); *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi A/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525.

[51] We have earlier referred to the appellant's contention that the Disciplinary Authority's mind had been clouded by the 'finding' of the Investigative Body that he failed to exculpate himself from the charges. What the appellant meant to say was that the report and/or recommendation of the Investigative Body, being an 'interested party', constituted fresh, additional and adverse material which was damaging and prejudicial to the appellant. It was submitted that this additional material should not have been taken into

account by the Disciplinary Authority in the decision making process.

[52] With due respect, we found no substance to the argument. In the first place, the Investigative Body did not recommend that the appellant be found guilty of the charges and be punished for the offences. It merely gave its opinion that the appellant failed to exculpate himself from the charges, but left the final decision to the Disciplinary Authority to determine the appellant's guilt or otherwise. This is clear from para 10 of the report where the investigating officer who prepared the report, namely ASP Wong Kok Yin, signed off as follows:

> YDH Tan Sri Dato' dengan hormatnya dipohon untuk menimbangkan representasi (B1) dan (B8) serta membuat keputusan sama ada (B1) dan (B8) bersalah ataupun tidak bersalah dan seterusnya mengenakan hukuman tatatertib mengikut Peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

[53] With due respect, we find it far fetched for learned counsel to suggest that the Disciplinary Authority, which was headed by the Deputy Inspector General of Police, could be influenced by the Investigating Officer, a policeman with the rank of Assistant Superintendent of Police, in determining the guilt or otherwise of the appellant, and we say this without demeaning the officer's role in the disciplinary process.

[54] In any event there is no evidence that the Disciplinary Authority's decision was based on the Investigative Body's finding that the appellant failed to exculpate himself from the charges. As can be seen from paras 4 and 5 of the minutes of the Disciplinary Authority's meeting, the Disciplinary Authority came to its finding after considering the evidence and the appellant's representation.

[55] On the facts, we entirely agree with the learned judge that the Disciplinary Authority had been provided with all the information it needed to enable it to evaluate the evidence and to make a well-informed decision. What is undeniable is that the Investigative Body's 'finding' (if at all it can be called a finding) that the appellant failed to exculpate himself from the charges had no binding effect on the Disciplinary Authority.

[56] It was the Disciplinary Authority and not the Investigative Body that was vested with the power to determine the guilt or otherwise of the appellant. In the circumstances, it was futile for the appellant to argue that the decision of the Disciplinary Authority had been compromised and tainted with biasness and procedural impropriety merely because the Investigative Body had given its opinion that the appellant failed to exculpate himself from the two disciplinary charges.

[57] It was for all the reasons aforesaid that we did not find this to be a fit and proper case for appellate interference with the decision of the High Court, hence our majority decision to dismiss the appeal with costs. My learned sister Rohana Yusuf JCA (now FCJ) had read this draft judgment and had expressed her agreement with it.

Appeal dismissed.

Reported by Ahmad Ismail Illman Mohd Razali